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No. 85-497

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

IN RE CHARGES OF UNPROFESSIONAL CONDUCT AGAINST N.P.,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OF APPELLEES MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD AND DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY

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QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court erred in holding that appellant's disciplinary proceeding will not be dismissed for a delay in the investigation when there has been no showing of prejudice to appellant resulting from the delay, and whether the decision rests on adequate and independent state grounds?

2. Whether the language of the Minnesota Supreme Court's opinion, which attributed to appellant responsibility for some of the delay in the disciplinary proceeding, was a penalty depriving him of a right to seek a redress of grievances in the courts in violation of the first amendment to the United States Constitution?

3. Whether the charges of unethical conduct filed against appellant are sufficiently specific to comply with due process standards by informing a panel of the Board of Professional Responsibility of the alleged unethical conduct so it can properly determine probable cause and by giving appellant fair notice so that he may prepare his defense?

4. Whether the Minnesota Supreme Court erred in sustaining the facial validity of Disciplinary Rules 1-102(A)(5) and (6), 2-103, 5-105, and 5-106, of the Minnesota Code of Professional Responsibility?

5. Whether this court may review appellant's questions 5 and 6 regarding the effect of the repeal of the Minnesota Code of Professional Responsibility and the adoption of the Rules of Professional Responsibility when those questions were not presented to the Minnesota Supreme Court?

PARTIES TO THIS PROCEEDING

Appellant: N.P. is an attorney licensed to practice law in the State of Minnesota and was denominated Respondent in the proceeding below.

Appellees: The Minnesota Lawyers Professional Responsibility Board is a board established by the Minnesota Supreme Court and given general supervisory authority over the conduct of attorney disciplinary proceedings; the Director of Lawyers Professional Responsibility administers the Rules of Lawyers Professional Responsibility by investigating complaints of attorney misconduct or disability and by initiating disciplinary actions where warranted.

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Appellees Minnesota Board of Professional Responsibility and Director of Lawyers Professional Responsibility, pursuant to Rule 16 of the Supreme Court of the United States, move to dismiss the appeal herein on the grounds that the questions presented are so insubstantial as not to need further argument, the decision of the Minnesota Supreme Court rested on adequate and independent state grounds, or the questions have not been finally determined by the highest court of the State of Minnesota.

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CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable constitutional provisions and the applicable provisions of the Minnesota Code of Professional Responsibility and of the Rules of Professional Responsibility are set forth by appellant (Jur. Stat. 3-4; A-47 to A-55).[1]

The applicable portions of the Minnesota Rules on Lawyers Professional Responsibility are Rule 2, Rule 7, Rule 8, Rule 9, Rule 13(a), and Rule 14. (State A-1 to State A-10).[2]

STATEMENT OF THE CASE

This is an appeal from the decision of the Minnesota Supreme Court denying appellant's petitions to that court for writs of prohibition, mandamus, or other extraordinary relief. Appellant is an attorney licensed to practice in the State of Minnesota. He is currently the subject of charges of unethical conduct issued by the director of the Minnesota Lawyers Professional Responsibility Board.[3]

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[1] Throughout this motion, the abbreviation "Jur. Stat." means appellant's Jurisdictional Statement; the abbreviation "A-" is a reference to the Appendix to the Jurisdictional Statement.

[2] Throughout this motion, the abbreviation "State A-" is a reference to the Appendix to the Motion to Dismiss of Appellees Minnesota Board of Professional Responsibility and Director of Lawyers Professional Responsibility.

[3] The conduct of lawyer disciplinary proceedings is governed by the rules of Lawyers Professional Responsibility. The full course of a disciplinary proceeding involving charges of serious misconduct has four stages. First, either the director or a local bar association ethics committee investigates the allegations contained in a complaint. Rules 7 and 8 (State A-1). Second, if the director concludes, on the basis of the results of the investigation, that public discipline is warranted, the director submits the results of the investigation to a three-member panel of the Board of Professional Responsibil-

The charges were drawn up by the director at the close of his investigation in May of 1984. The charges were served on appellant and submitted to a panel of the Board for a probable cause determination. The probable cause hearing was never held because appellant filed his petitions with the Minnesota Supreme Court challenging several procedural rules of the disciplinary process, the facial validity of the substantive rules governing attorney conduct which appellant was charged with violating, and the sufficiency of the charges brought by the director.

Appellant contended that the investigation should be dismissed because the director had unreasonably delayed the investigation of appellant for five and one-half years. *In re Charges of Unethical Conduct Against N.P.*, 361 N.W.2d 386, 392 (Minn. 1985) (hereinafter "N.P.") (A-8). While the Minnesota Supreme Court acknowledged that the actual investigation was commenced four years before the charges were filed, the court was not concerned solely with the length of delay. The court considered whether the delay had resulted in prejudice to appellant. The court properly determined that there had been no showing of prejudice to appellant noting that much of the reason for delay was attributable to appellant's own actions in resisting the director's investigation. *N.P.*, 361 N.W.2d at 393 (A-8 to A-9).

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ity. The panel determines whether probable cause exists to believe that public discipline is warranted. If the panel so determines, the panel instructs the director to file a petition for disciplinary action in the supreme court. Rules 8(c)(4)(i) and 9 (State A-2). Third, upon the director's filing his petition, the supreme court appoints a referee who conducts a trial-like hearing and submits findings, conclusions, and recommendations to the court. Rule 14 (State A-9). Fourth, the court rehears the matter on the record, briefs, and argument and makes a final disposition. Rule 14(e) (State A-10).

Appellant also challenged the charges filed against him as vague, contradictory, duplicitous and inadequately supported. The Minnesota Supreme Court noted that the charges were issued only as part of a preliminary investigation to ascertain probable cause for issuance of a formal petition and that appellant would have ample opportunity to assert his claims regarding the specificity of the charges if the charges mature into a formal hearing. The court then determined that the charges are sufficiently specific to satisfy due process in view of their informal nature and the extensive background peculiar to this case.[4] *Id.* at 395 (A-14).

The Minnesota Supreme Court also rejected appellant's constitutional challenges to the facial validity of the disciplinary rules under which he was charged. The court determined that Disciplinary Rule 1-102(A)(5) and (6), which proscribes conduct prejudicial to the administration of justice and conduct that adversely reflects on a lawyer's fitness to practice law, is sufficiently well defined to satisfy due process when read in conjunction with the other disciplinary rules. *Id.* at 395 (A-15). Disciplinary Rule 2-103, which proscribes in-person and telephonic solicitation of clients and the payment of referral fees, was determined by the court to be neither facially vague nor violative of the first amendment. The court noted that whether the rule was unconstitutional as applied to appellant was not yet at issue. *Id.* at 396 (A-17). Similarly, the court determined that Disciplinary Rule 5-105A, which sets forth the contours of employment involving conflicts of interest, is not facially defective, and that whether it violates

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[4] The factual and procedural background of appellant's disciplinary proceeding involves numerous collateral actions and events that span a period of nearly six years. The opinion of the Minnesota Supreme Court contains a summary of the background. *N.P.*, 361 N.W.2d at 389-392. (A-1 to A-8).

due process as applied to appellant must await introduction of evidence. *Id.* at 396 (A-18). Finally, the Minnesota Supreme Court determined that the director's use of the term "block settlements" in his charges did not mislead appellant and that Disciplinary Rule 5-106, which proscribes aggregate settlements without full disclosure to each client, clearly informs an attorney as to the kind of conduct prohibited. *Id.* at 396 (A-19).

Subsequent to the court's decision on January 25, 1985, denying appellant's petitions, but while appellant's petition for a rehearing was pending, the court by order dated June 3, 1985, repealed the then existing Minnesota Code of Professional Responsibility effective August 31, 1985, and adopted the Minnesota Rules of Professional Conduct effective September 1, 1985. Appellant raises for the first time in this Court two questions concerning the effect of the court's order on his disciplinary proceeding.

Appellees submit this motion to dismiss on the grounds that appellant has failed to raise a substantial federal question warranting further review by this Court and has raised questions not properly before this Court on appeal.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S DECISION, THAT APPELLANT'S DISCIPLINARY PROCEEDING WILL NOT BE DISMISSED FOR DELAY IN THE INVESTIGATION WHEN THERE HAS BEEN NO SHOWING OF PREJUDICE TO APPELLANT FROM THE DELAY, IS PLAINLY CORRECT AND RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Appellant argues that the Minnesota Supreme Court should have dismissed the director's investigation because the director had unreasonably delayed the investigation. The court correctly found no merit to appellant's argument. The court held that appellant had not shown that he had been unfairly prejudiced by the delay. The court's decision rests not on federal principles of due process, but on the equity principle of laches. Moreover, appellant offers no authority for his contention herein that the delay violated due process. Thus, this Court has no jurisdiction under 28 U.S.C. § 1257 to review the Minnesota Supreme Court's determination of the question of delay.

This Court has no jurisdiction to review a state court decision if the judgment below is supported by an adequate state ground. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 566 (1977). In the present case the Minnesota Supreme Court's decision concerning the issue of undue delay rested on the state equity principle of laches. In the Minnesota courts, the doctrine of laches depends upon a determination in each case as to whether there has been so unreasonable a delay in asserting a known right, resulting in prejudice to others, that it would be inequitable to grant the relief prayed for. *Klapmeier v. Town of Center of Crow Wing County*, 346 N.W.2d 133, 137 (Minn. 1984).

Thus, when the Court held that unless an attorney has been unfairly prejudiced, it would not be in the public interest to dismiss a disciplinary proceeding simply because of failure to prosecute promptly, the Court was relying on the doctrine of laches. Moreover, the cases cited by the court, its own as well as those from other jurisdictions, rely upon the equity principle of laches rather than upon due process doctrine.[5] *N.P.*, 361 N.W.2d at 393 (A-9).

Conspicuously absent from appellant's jurisdictional statement is any authority for his contention that the director's delay violated due process. Appellant cites *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) and *United States v. Shaughnessey*, 347 U.S. 260, 265 (1954), for the undisputed proposition that agencies must follow their own rules. Yet he provides no authority defining when a delay constitutes a deprivation of due process.

Appellant appears to argue that the Minnesota Supreme Court erred by failing to cite Rule 2 of the Rules of Lawyers Professional Responsibility which provides in part that allegations of unprofessional conduct be investigated promptly. (State A-1). Appellant asserts that such failure is itself a violation of appellant's due process rights. (Jur. Stat. 9). Appellant misstates the court's opinion. As discussed above, the court considered whether the lapse of time had unfairly prejudiced appellant, and found that appellant had not shown prejudice. The court did not fail to apply Rule 2 to the director's investigation; it simply found against appellant.

Thus, appellant fails to raise a federal question to invoke this Court's jurisdiction under 28 U.S.C. § 1257. His appeal should therefore be dismissed.

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[5] In one of the cited cases, *Ramirez v. State Bar of California*, the opinion does use the phrase "due process" in a three sentence disposition of the laches issue there, 619 P.2d 399, 405 (1980); however, the decision there could properly rest on equity principles only.

II. THE LANGUAGE IN THE OPINION OF THE MINNESOTA SUPREME COURT, WHICH ATTRIBUTED TO APPELLANT SOME RESPONSIBILITY FOR THE DELAY IN HIS DISCIPLINARY PROCEEDING, IS PLAINLY NOT A PENALTY, AND APPELLANT'S ARGUMENT TO THE CONTRARY FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant contends herein that the very language of the Minnesota Supreme Court's opinion which states, "We add, moreover, that not only has there been no showing of prejudice but that much of the reason for delay is attributable to petitioner's own actions since November 1982 in resisting the director's investigation," is itself a violation of due process. (Jur. Stat. 8 to 10). Appellant appears to premise this meritless contention on the theory that the court's language constitutes a penalty imposed on appellant because he resisted the director's attempts to obtain documentary evidence in the possession of the United States Attorney in 1982 and successfully obtained delays in the disciplinary proceedings while his petitions to the court were pending in 1984. Appellant argues that the alleged penalty is impermissible under *Spevack v. Klein*, 385 U.S. 511 (1967), and *Blackledge v. Perry*, 417 U.S. 21 (1974). Appellant's reliance on *Spevack* and *Blackledge* is totally misplaced.

As discussed above, laches is a doctrine of equitable relief. A party seeking equitable relief cannot at the same time insist that the court disregard any fact in his own conduct which makes the sought after relief inequitable. *Aronovitch v. Levy*, 56 N.W.2d 570, 574 (Minn. 1953).

The first complaint of improper conduct against appellant reached the director's office in July of 1979. After a prompt investigation by the director, the complaint was dismissed in

September, 1979, with a finding of no unethical conduct. The director subsequently reopened the investigation in June of 1980, when he discovered evidence that appeared not only to substantiate the complaint, but also to indicate that appellant had falsified evidence in connection with the original investigation. *N.P.*, 361 N.W. at 390 (A-2).

The director properly stayed his investigation during 1980, 1981 and 1982, while appellant was the subject of grand jury investigations and a federal criminal trial. After appellant was acquitted of all criminal charges on November 20, 1982, the director requested access to trial exhibits that he believed would aid his investigation. Appellant resisted the director's request in both federal and state district courts. The exhibits were not finally ordered to be turned over to the director until September, 1983. The director then resumed his investigation and, at its close, filed charges against appellant on May 8, 1984. *Id.* at 390-391 (A-2 to A-4).

The court properly viewed appellant's resistance to the director's request for federal trial exhibits for over eleven months as one factor in balancing the equities on the laches issue. Finding that appellant's conduct had contributed to some of the delay, the court correctly denied appellant's request to dismiss the investigation.

Appellant also cannot, in view of the opinion below, maintain that the Minnesota Supreme Court has penalized him for challenging the director's investigation through his petitions to that court. In a part of the court's opinion not at issue here, the court carefully determined that good faith challenges to the director's investigative requests will not result in discipline. The court further provided a process to safeguard attorneys subject to investigation from requests which encroach on constitutionally protected conduct and from other unreasonable requests. *N.P.*, 361 N.W.2d 394-395 (A-13).

Thus, appellant's characterization of the court's language as a penalty equivalent to the loss of a significant property right suffered by Spevack as a result of his asserting fifth amendment rights, *Spevak*, 385 U.S. at 516, or the loss of liberty suffered by Perry as a result of his invocation of a statutory right of appeal, *Blackledge*, 417 U.S. at 28, is patently untenable. In sum, appellant's argument, besides evidencing a convoluted logic, fails to raise any issue of sufficient constitutional dimension or merit to warrant consideration by this Court. His appeal should therefore be dismissed.

III. THE CHARGES OF UNETHICAL CONDUCT FILED AGAINST APPELLANT ARE SUFFICIENTLY SPECIFIC TO COMPLY WITH DUE PROCESS STANDARDS, AND APPELLANT'S ARGUMENTS TO THE CONTRARY FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant contended below that the charges submitted by the director for a determination of probable cause are vague, contradictory, duplicitous, and inadequately supported. Appellant argues herein that in finding the charges sufficiently specific, the court erred in failing to apply the same standard of specificity to the charges of unethical conduct as it would to a formal petition and that the court's alleged error deprived him of due process. (Jur. Stat. 10-11).

The court was entirely correct in rejecting appellant's contentions. Noting that it was dealing only with preliminary charges issued at the probable cause stage of the proceeding and not with a formal petition for discipline, the court correctly found the charges sufficiently specific to satisfy due process, given their informal nature and the extensive background peculiar to this case. *N.P.*, 361 N.W.2d at 395 (A-14).

As the following will demonstrate, the charges, as formulated by the director, fully comport with due process standards by not only giving appellant fair notice of the conduct alleged in support of the charges but also informing the probable cause panel of the facts alleged so that it may decide whether they are sufficient under the disciplinary code to support a finding of probable cause. The appeal of this issue thus presents no substantial federal question that warrants further review.

A. The Charges Are Sufficiently Specific To Give Appellant Fair Notice Of The Conduct Charged As Unethical So That He May Prepare His Response.

In disciplinary proceedings, attorneys are entitled to procedural due process, which includes fair notice of the charges before the proceeding commences. *In re Ruffalo,* 390 U.S. 544, 550-551 (1968). In *Ruffalo,* the petitioner there had no notice that certain conduct would be considered a disbarment offense until after he had presented evidence on all the material facts pertaining to that conduct. Thus he was trapped into giving evidence before he had an opportunity to know the precise charge on which he was ultimately disbarred. *Id.* at 551.

The charges against appellant herein contain no such infirmity. The charges, as framed by the director, communicate appellant's wrongful conduct with sufficient clarity that he is given fair notice of the alleged unethical conduct in order to prepare a response.

The charges are set forth in a 12-page "Director's Charges of Unprofessional Conduct, Notice of Prehearing and Notice of Panel Assignment" with some 14 attached exhibits. (A-20 to A-33, and A-64 to A-71). The document contains an introductory section which identifies persons referred to in the charges and defines pertinent terms. Each of the five suc-

ceeding charges is introduced by a heading (e.g., "Respondent Solicited Dalkon Shield Clients and Altered Referral Records to Subvert the Disciplinary Investigation"). The charges are also preceded by a succinct narrative summarizing the factual basis supporting the charge and referencing supporting exhibits. The charges themselves are set forth as one or more discrete statements of the wrongful conduct with references to the pertinent disciplinary rules.

Appellant creatively, but entirely without merit, attempts to suggest that since he is able to find some comfort, with whatever warrant, in some of the exhibits attached to the Director's charges that he is therefore being "entrapped," as was the case in *Ruffalo*. (A-11 to A-12). There is no attempt here to get appellant to posit a defense to any of the charges against him on any basis that would constitute a further basis for discipline. Nor do any of appellant's readings of the exhibits attached to the charges in any way support such a contention.

Appellant appears to urge this Court to apply the principles enunciated in *Zauderer v. Office of Disciplinary Counsel*, —— U.S. ——, 105 S.Ct. 2265, 2283 (1985), to his allegations regarding the specificity of the charges. (Jur. Stat. 14). Whatever appellant's representations of *Zauderer* may be, the Court's decision there fully supports the decision below. Attorney Zauderer was disciplined in part for an advertisement soliciting defense of drunk driving cases. The advertisement stated that clients' full legal fees would be refunded if they were convicted of drunk driving. A complaint filed by the Ohio Office of Disciplinary Counsel alleged that the advertisement was deceptive on the theory that it offered representation on a contingent fee basis, which could not be carried out under the disciplinary rules. However, the disciplinary panel

of the Ohio Board of Commissioners used a basis different from the Office of Disciplinary Counsel for disciplining the attorney. The panel found that the advertisement might be deceptive on the theory that it failed to mention the common practice of plea bargaining and potential clients would be unaware of the likelihood that they would both be found guilty of a lesser offense and be liable for attorney fees because they had not been convicted of drunken driving. The Supreme Court of Ohio, in turn, adopted the panel's findings. The attorney contended before this Court that the discrepancy in the theory asserted by the Office of Disciplinary Counsel and the theory relied upon by the Ohio Supreme Court and its Board of Commissioners violated due process. However, this Court held that the discrepancy did not violate the constitutional guarantee of due process. In Part VI of its Opinion, the Court stated:

> That the Board of Bar Commissioners chose to make its recommendation of discipline on the basis of reasoning different from that of the Office of Disciplinary Counsel is of little moment: what is important is that the Board's recommendations put appellant on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio.

Zauderer, 105 S.Ct. at 2284.

The Court's reasoning holds true with even greater force in this case. Here, the charges have a lengthy history, are fully detailed, and the proceedings are at a much earlier stage.

Finally, appellant erroneously argues that the Rules of Lawyers Professional Responsibility fail to provide for dismissing multiple, duplicitous, contradictory, or unconstitutional allegations, exhibits, and charges. (Jur. Stat. 13). The rules, in fact, provide ample opportunity to challenge the

specificity and sufficiency of both the charges filed to ascertain probable cause and later charges filed in a formal petition for disciplinary action. Rule 9(e)(1) and (2) provides for a pre-hearing before the panel hearing in which the director and appellant may formulate stipulations of facts, narrow and simplify issues, and admit or object to exhibits. (State A-6). Rule 9(m) gives the panel chair authority over requests or disputes arising under Rule 9. (State A-9).

Should the panel find probable cause and instruct the director to file a petition for disciplinary action in the Supreme Court, appellant will have an even broader opportunity to raise constitutional challenges to the charges in the petition. Rule 13(a) allows appellant to raise any defense, privilege, or matter in mitigation in his answer to the director's petition. (State A-9). In the subsequent hearing before a referee under Rule 14(b) and the following hearing before the Supreme Court under Rule 14(e), appellant can assert whatever claims concerning the specificity of the charges the petition may warrant.[6] (State A-10).

The foregoing amply demonstrates that the Minnesota Supreme Court was entirely correct when it concluded, "[appellant] will have adequate opportunity to assert such claims if and when the charges mature into a formal petition." *N.P.*, 361 N.W.2d at 395. (A-14).

Thus, the Minnesota Supreme Court's determination that the charges are sufficiently specific to comply with due process is entirely correct. Appellant raises no substantial federal question that warrants further review by this Court.

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[6] Hearings before a referee are conducted according to the rules of civil procedure applicable to state district courts, which provide appellant with the opportunity to test the petition's charges through motions on the pleadings and motions for summary judgment.

B. The Charges Are Sufficiently Specific To Inform A Panel Of The Board Of The Conduct Alleged As Unethical So That It May Determine Probable Cause.

In the context of a pleading in a criminal proceeding, this Court has held that the purpose of specificity in an indictment is in part to inform the court of the facts alleged, so that the court may decide whether they are sufficient in law to support a conviction. *U.S. v. Cruikshank*, 92 U.S. 542, 558 (1876). Applying the principles of *Cruikshank* to the decision below, as appellant urges, it is clear that the director's charges are sufficiently specific in view of the procedural posture at issue.[7]

The procedural posture below is a probable cause determination by a panel of the Board. The panel must decide, after hearing, whether there is probable cause to believe that public discipline is warranted. Rule 9(i), Rules of Lawyers Professional Responsibility (State A-8). When the principles enunciated in *Cruikshank* are applied to a probable cause determination under Rule 9(i), *a fortiori* the charges submitted for the probable cause determination must be sufficiently specific to inform the probable cause panel of the conduct alleged in sufficient detail to enable the panel to decide whether the conduct supports a finding that public discipline is warranted under the Code of Professional Conduct.

The charges against appellant, as the following summary demonstrates, communicate appellant's alleged wrongful conduct with sufficient clarity so that the probable cause panel may make their determination. Appellant solicited cases and

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[7] Appellee does not argue that the due process requirements of a criminal proceeding are applicable in full to an administrative proceeding, but rather that the principles enunciated long ago in *Cruikshank* are helpful in determining the appropriate standards herein.

paid referral fees, altered law firm records to hide the payment of the referral fees, and directed an associated attorney to subvert a disciplinary investigation. Appellant paid monies to an insurance investigator while the investigator was an adjuster negotiating Dalkon Shield claims with appellant, thus undermining the investigator's loyalty to his employer. Appellant received confidential information from the investigator to enhance his client's case, subverting the adversary system. Appellant created serious conflicts of interest for the investigator and took advantage of him to the detriment of his clients, the insurance company, the defendant manufacturer, and the legal system. Appellant failed to disclose to his clients his employment of the investigator, breaching his fiduciary duty to his clients. His settlement of Dalkon Shield claims with the investigator or the investigator's co-workers jeopardized the settlements due to the investigator's role in the settlement. Appellant failed to maintain in the trust account monies equal to the monies to be held in trust, and failed to pay clients interest earned on client money. Appellant deposited firm funds in the trust account and failed to remove law firm monies from the trust account, thereby commingling client monies with law firm monies. Appellant failed to maintain proper books and records to determine interest earned on client money. Appellant paid insurance adjusters with whom the law firm negotiated cases, thereby undermining the adjusters' loyalty to their employers. Appellant created a conflict of interest for the adjusters and took advantage of them, to the detriment of appellant's clients, the insurance companies, the insured, and the legal system. Appellant charged clients for expenses not incurred, constituting a conversion of client monies. *N.P.*, 361 N.W.2d at 391-392. (A-4 to A-6).

The conduct alleged in the charges is thus clearly specified, so the panel may determine whether the conduct is sufficient under the Code of Professional Responsibility to support a finding of probable cause.

In conclusion, the Minnesota Supreme Court correctly determined that the charges served upon appellant are sufficiently specific to comply with due process. The charges sufficiently inform a panel of the Board of the alleged unethical conduct charged so that the panel can make a probable cause determination. The charges also give appellant fair notice of the charges so that he may prepare his defense. Finally, the procedural rules governing attorney disciplinary actions provide appellant with ample opportunity to challenge the director's charges should they mature into a formal petition.

Thus, appellant fails to raise a substantial federal question warranting review by this Court. Appellant's appeal should, therefore, be dismissed.

IV. THE DECISION OF THE MINNESOTA SUPREME COURT, DETERMINING THAT DISCIPLINARY RULES 1-102(A)(5) AND (6), 2-103, 5-105 AND 5-106 ARE FACIALLY VALID, IS PLAINLY CORRECT, AND APPELLANT'S ARGUMENTS TO THE CONTRARY FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant argues that Disciplinary Rules 1-102(A)(5) and (6), 2-103, 5-105 and 5-106 are facially vague in that they impose incomprehensible standards of conduct on lawyers. (Jur. Stat. 16). When appellant's vagueness challenge is analyzed in light of decisions in this Court, it is apparent that

he presents no substantial federal question that warrants further review.[8]

This court has long recognized that "it is difficult, if not impossible, to enumerate and define with legal precision, every offense for which an attorney or counselor ought to be removed". *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 14 (1856). Yet essential due process guarantees apply fully to attorney disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544, 550 (1968). The due process standards applicable to rules governing attorney conduct have been most recently summarized by Justice Brennan in his partial dissent and partial concurrence in *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265, 2289-2290, (n.8 omitted):[9]

> A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The Fourteenth Amendment's Due Process Clause "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

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[8] Appellant raises a question concerning Disciplinary Rule 2-103, which proscribes in person and telephonic solicitation of clients (Jur. Stat. iii); however, appellant did not present argument on this question.

[9] Justice Brennan's partial concurrence and partial dissent was not based upon the majority's use of a vagueness standard different than that asserted by Justice Brennan. Rather, in the context of the vagueness standard applicable to regulations involving attorney commercial speech, J. Brennan would have held that Ohio's rule did not contain properly specific prophylactic measures regarding cost disclaimers in advertisements involving contingent fees. *Id.* at 2291.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). This requirement "applies with particular force in review of laws dealing with speech," *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser," *Smith v. California*, 361 U.S. 147, 151 (1959).

. . .

Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession." [In re *Ruffalo*, 390 U.S.] at 555 (WHITE, J., concurring in result)*

*Arguably vague regulations may take on "definiteness and clarity" in the context of the profession's "complex code of behavior," and an attorney is properly charged with knowledge of all applicable disciplinary rules and ethical guidelines. *In re Bithoney*, 486 F.2d 319, 324-325 (CA1 1973). See also Comment, ABA Code of Professional Responsibility: Void for Vagueness?, 57 N.C.L. Rev. 671, 676-680 (1979).

In that portion of *Ruffalo* cited by Justice Brennan, Justice White considered whether it was proper to disbar Ruffalo under a general standard of the Court of Appeals for the Sixth Circuit. The standard included "conduct unbecoming a member of the bar of the court." *Ruffalo*, 390 U.S. at 555. Justice White reasoned that even when a disbarment standard is as unspecific as that of the Sixth Circuit, members of a bar

can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment, including conduct which all responsible attorneys would recognize as improper for a member of the profession. *Id.* at 555.

As the following demonstrates, the disciplinary rules challenged by appellant clearly put responsible attorneys on notice of the conduct prohibited so that they may act accordingly.

A. The Court Was Correct In Holding That The Standards Of Conduct Contained In Disciplinary Rule 1-102(A)(5) And (6) Are Sufficiently Defined When The Rule Is Read In Conjunction With The Other Disciplinary Rules.

Disciplinary Rule 1-102(A)(5) and (6) provides:

> (A) A lawyer shall not
>
> . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Appellant contends that Disciplinary Rule 1-102(A)(5) and (6) imposes incomprehensible standards on attorney conduct. (Jur. Stat. 16). The Minnesota Supreme Court's construction of the standards contained in Disciplinary Rule 1-102(A)(5) and (6), which incorporates into the rule all of the ethical strictures of the Code of Professional Responsibility, cures any arguably impermissible vagueness on the face of the rule.

In the construction of standards of judicial conduct, the Minnesota Supreme Court has recognized that necessarily broad standards of professional conduct incorporate specific rules contained in the Code of Professional Responsibility and

the Code of Judicial Conduct. *In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978).

In the present case, the court properly concluded that the standards set forth in Disciplinary Rules 1-102(A)(5) and (6) "do no more than reflect the fundamental principle of professional responsibility that an attorney, as an officer of the court, has a duty to deal fairly with the court and the client." The court then defined an attorney's duty as that which embraces all of the ethical strictures of the Code of Professional Responsibility. "Read in conjunction with the other disciplinary rules," the court concluded, "these phrases are sufficiently well defined to satisfy due process." *N.P.*, 361 N.W.2d at 396 (A-15).

The court's construction of the standards in Disciplinary Rule 1-105(A)(5) and (6) thus gives the definiteness and clarity to their application to attorney conduct. The scope of "conduct prejudicial to the administration of justice" and "conduct that adversely reflects on his fitness to practice law," is limited to conduct prohibited by all of the ethical strictures of the Code. Responsible attorneys need not guess at the meaning of Disciplinary Rule 1-105(A)(5) and (6).

B. Disciplinary Rule 2-103 Is A Permissible Prophylactic Measure Restricting In-Person And Telephonic Solicitation Of Clients, And Its Detailed Provisions Comport With Due Process Standards.

The provisions of Disciplinary Rule 2-103(A) are as follows:

> (A) The following prohibitions shall apply to in-person or telephonic communications, and to employment resulting therefrom, but shall not apply to advertisement, written communications or to employment resulting therefrom, unless the communications contain false, fraudu-

lent, misleading or deceptive statements, or claims prohibited under DR 2-101.

(1) A lawyer shall not recommend employment as a private practitioner, of himself or anyone associated with him to a non-lawyer who has not sought his advice regarding employment of a lawyer.

(2) A lawyer shall not compensate or give anything of value to any person to recommend or secure, or as a reward for having recommended or secured employment by client of himself or any lawyer associated with him, with the exception of public relations or advertising services.

(3) A lawyer shall not request any person to recommend employment, as a private practitioner, of himself or anyone associated with him.

In the proceeding below, appellant claimed that Disciplinary Rule 2-103(A) is vague and violates his right of free speech. As the Minnesota Supreme Court noted, appellant's claim that such a detailed rule is vague is "patently without merit." The court also properly rejected appellant's argument that the rule violated his right of free speech. *N.P.*, 361 N.W.2d at 397 (A-17).

In rejecting appellant's first amendment challenge, the court relied on decisions of this Court in *In re Primus*, 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978), and on its own decision in *In re Discipline of Appert*, 315 N.W.2d 204, 210-15 (Minn. 1981). This Court's decision in *Ohralik*, makes clear that states may employ prophylactic measures to avert the inherent dangers of overreaching and other misconduct inherent in in-person solicitation of clients. *Ohralik*, 436 U.S. at 464.

Disciplinary Rule 2-103(A) is limited on its face to in-person and telephonic solicitation. Its use is thus entirely permissible as a prophylactic measure to serve the state's compelling interest in restricting solicitation of the kind proscribed by the rule. *See N.P.*, 361 N.W.2d at 396 (A-17).

Appellant's vagueness challenge to Disciplinary Rule 2-103 (A) was also properly rejected. Due process requires that rules give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited, so that he may act accordingly. *Grayned*, 408 U.S. 104, 108 (1972). The detailed provisions of Disciplinary Rule 2-103(A) are so clear and definite in their descriptions of prohibited conduct that the court was entirely correct in rejecting appellant's vagueness challenge as patently meritless.

C. The Standard Of Conduct Mandated By Disciplinary Rule 5-105(A) To (C) Is Reasonably Ascertainable To Members Of The Legal Profession.

Disciplinary Rule 5-105(A) to (C) provides:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Appellant premises his vagueness challenge to Disciplinary Rule 5-105 on a contention that the rule fails to provide an objective standard for when "the exercise of his independent professional judgment . . . will be or is likely to be affected," by multiple representation. The Minnesota Supreme Court's determination, that the words "will or is likely to be adversely affected" indicate that an attorney sensitive to fiduciary obligations will err, if at all, on the side of rejecting questionable employment, provides a reasonably ascertainable standard of conduct. *N.P.*, 361 N.W.2d at 396 (A-18), (Jur. Stat. 16).

Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of facts in the case at hand. *U.S. v. Powell,* 423 U.S. 87, 92 (1975). Under the principles enunciated in *Powell,* it is clear that a statute which gives adequate warning of prohibited conduct will be sustained even though doubts as to the applicability of the statute's language in marginal fact situations may be conceived. When a party whose conduct is regulated by the statute has been given clear notice that a reasonably ascertainable standard of conduct is mandated, it is for him to insure that his actions do not fall outside legal limits. *Id.* at 92-93.

While the decision in *Powell* concerned a vagueness challenge to a criminal statute, this appeal presents a rule setting forth

the ethical contours of attorney employment involving conflicts of interest. As the Minnesota Supreme Court noted, the specific situations that would violate the rule cannot be catalogued in detail. *N.P.*, 361 N.W.2d at 396 (A-18). The rule does, however, encompass a reasonably ascertainable standard of conduct, an attorney's fiduciary obligations to his client. It goes without saying that an attorney's professional training and the traditions of the legal profession enable him to insure that his conduct does not violate his fiduciary duty to his clients. The court was thus entirely correct in rejecting appellant's challenge to the rule on its face. Whether the rule, as applied to appellant, violates due process, must await introduction of evidence.

D. The Complete Text Of Disciplinary Rule 5-106 Clearly Informs Attorneys Of The Kind Of Conduct Prohibited.

Disciplinary Rule 5-106 provides as follows:

> (A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

Appellant contends that the above rule is impermissibly vague because the term "aggregate settlement" is not defined. Such contention is without merit.

As discussed above, a statute does not violate due process if it gives a person of ordinary intelligence reasonable notice of the conduct prohibited. *Grayned*, 408 U.S. at 108.

In the proceeding below, appellant argued that the director used the phrase "block settlement" in the charge that appellant violated Disciplinary Rule 5-106 rather than the phrase "aggregate settlement" which is contained in the rule. Appellant did not suggest that there was a difference between the two phrases, but only that the director's inconsistency indicates a vagueness in the rule. *N.P.*, 361 N.W.2d at 397 (A-18 to A-19). Appellant cannot therefore argue that the rule does not give men of ordinary intelligence notice of the conduct prohibited by the rule. Thus the Minnesota Supreme Court was entirely correct in summarily rejecting appellant's vagueness claim:

> [P]articularly when viewed in the general context in which the rule was invoked, we find it most difficult to see how appellant was misled or misinformed. In any event, the complete text of the rule needs no parsing of words and phrases to clearly inform an attorney as to the kind of conduct that is prohibited."

N.P., 361 N.W.2d at 397. (A-19).

In summary, the Minnesota Supreme Court's decision upholding the facial validity of the challenged disciplinary rules comports with its own precedents as well as with those in this Court. Accordingly, there is no need for this Court to review that decision to vindicate federal rights.

V. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW APPELLANT'S QUESTIONS 5 AND 6 REGARDING THE REPEAL OF THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE ENACTMENT OF THE RULES OF PROFESSIONAL RESPONSIBILITY BECAUSE THOSE QUESTIONS WERE NOT PRESENTED TO THE MINNESOTA SUPREME COURT.

By order dated June 13, 1985, the Minnesota Supreme Court adopted a new standard of lawyer professional responsibility, the Minnesota Rules of Professional Conduct. The new rules became effective September 1, 1985, and replaced the previous Code of Professional Responsibility. (A-54 to A-55). Appellant raises for the first time herein questions regarding the effect of the court's order on his disciplinary proceeding. Since these questions were not raised in the Minnesota Supreme Court, this Court does not have jurisdiction to review them on appeal.

It is axiomatic that before this Court has jurisdiction to review a claim of federal right, the claim "must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice. . . ." *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 493 (1919).

Appellant misinforms this Court when he states, "Appellant sought and obtained review in the State Supreme Court on original petitions on each of the issues presented in this appeal." (Jur. Stat. 6). Appellant did not raise these issues before the Minnesota Supreme Court and it is patent from the court's opinion that it did not consider them. Therefore, since this Court lacks jurisdiction under 28 U.S.C. § 1257 to review these questions, appellant's appeal should be dismissed.

CONCLUSION

For the foregoing reasons, the appellees respectfully submit that this appeal presents no substantial question for the decision of this Court, questions which the Minnesota Supreme Court decided on adequate and independent state grounds, and questions which were not presented to the court below. The appeal should therefore be dismissed.

Dated: October 14, 1985

Respectfully submitted,

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APPENDIX

Relevant excerpts from the Rules of Lawyers Professional Responsibility, adopted November 1, 1976, effective January 1, 1977, with amendments received through July 15, 1984.

Rule 2. Purpose

It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.
(Amended July 22, 1982.)

Rule 7. District Committee Investigation

(a) Assignment; Assistance. The District Chairman may investigate or assign investigation of the complaint to one or more of the Committee's members, and may request the Director's assistance in making the investigation. The investigation may be conducted by means of written and telephonic communication and personal interviews.

(b) Report. The District Chairman or his designee shall report the results of the investigation to the Director. The report shall include a recommendation that the Director:

(1) Determine that discipline is not warranted;

(2) Issue an admonition;

(3) Refer the matter to a Panel; or

(4) Investigate the matter further.

(c) Time. The investigation shall be completed and the report made promptly and, in any event, within 45 days after the District Committee received the complaint, unless good

cause exists. If the report is not made within 45 days, the District Chairman or his designee within that time shall notify the Director of the reasons for the delay.

(d) Removal. The Director may at any time and for any reason remove a complaint from a District Committee's consideration by notifying the District Chairman of the removal.

(e) Notice to Complainant. The Director shall keep the complainant advised of the progress of the proceedings.

Rule 8. Director's Investigation.

(a) Initiating Investigation. At any time, with or without a complaint or a District Committee's report, the Director may make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers.

(b) Investigatory subpoena. With the Board Chairman or Vice-Chairman's approval upon the Director's application showing that it is necessary to do this before issuance of charges under Rule 9(a), the Director may subpoena and take the testimony of any person believed to possess information concerning possible unprofessional conduct of a lawyer. The examination shall be recorded by such means as the Director designates. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the examination.

(c) Disposition.

(1) *Determination Discipline not Warranted.* If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted he shall so notify the lawyer involved, the complainant, and the Chairman of the District Committee, if any, that has considered the complaint. The notification:

(i) May set forth an explanation of the Director's conclusion;

(ii) Shall set forth the complainant's identity and the complaint's substance; and

(iii) Shall inform the complainant of his right to appeal under subdivision (d).

(2) *Admonition.* In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature, he may issue an admonition. The Director shall notify the lawyer in writing:

(i) Of the admonition;

(ii) That the admonition is in lieu of the Director's presenting charges of unprofessional conduct to a Panel;

(iii) That the lawyer may, by notifying the Director in writing within fourteen days, demand that the Director so present the charges to a Panel which shall consider the matter de novo or instruct the Director to file a Petition for Disciplinary Action in this Court; and

(iv) That unless the lawyer so demands the Director after that time will notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, that the Director has issued the admonition.

If the lawyer makes no demand under clause (iii), the Director shall notify as provided in clause (iv). The notification to the complainant, if any, shall inform him of his right to appeal under subdivision (d).

(3) *Stipulated probation.* In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional and the Board Chairman or Vice-Chairman approves, the Director and the lawyer may agree that the proceedings will be held in abeyance for a specified period up to two years and thereafter terminated, provided the lawyer throughout the period complies with specified reasonable conditions. At any time during the period, with the Board Chair-

man or Vice-Chairman's approval, the parties may agree to modify the agreement or to one extension of it for a specified period up to two additional years. The Director shall notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, of the agreement and any modification. The notification to the complainant, if any, shall inform him of his right to appeal under subdivision (d). The Director may reinstitute the underlying proceedings if the lawyer consents or a Panel determines that the lawyer has violated the conditions.

(4) *Submission to Panel.* The Director shall submit the matter to a Panel under Rule 9 if:

(i) In any matter, with or without a complaint, the Director concludes that public discipline is warranted;

(ii) The lawyer makes a demand under subdivision (c) (2) (iii);

(iii) The lawyer consents or a Panel determines that the lawyer has violated conditions under subdivision (c) (3); or

(iv) A Panel chairman so directs upon an appeal under subdivision (d).

(d) Complainant's appeal. If the complainant is not satisfied with the Director's disposition under Rule 8(c) (1), (2) or (3), he may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the lawyer of the appeal and assign the matter to a Panel chairman by rotation. The Panel chairman may approve the Director's disposition or direct that the matter be submitted to a Panel other than his own.

(Amended July 22, 1982.)

Rule 9. Panel Proceedings

(a) Charges; Setting Pre-Hearing Meeting. If the matter is to be submitted to a Panel, the Director shall prepare

charges of unprofessional conduct, assign them to a Panel by rotation, schedule a pre-hearing meeting, and notify the lawyer of:

(1) The charges;

(2) The name, address, and telephone number of the Panel chairman and vice-chairman;

(3) The time and place of the pre-hearing meeting; and

(4) The lawyer's obligation to appear at the time set unless the meeting is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman.

(b) Admission of Charges. The lawyer may, if he so desires:

(1) Admit some or all charges; or

(2) Tender an admission of some or all charges conditioned upon a stated disposition.

If a lawyer makes such an admission or tender, the Director may proceed under Rule 10(b).

(c) Request for Admission. Either party may serve upon the other a request for admission. The request shall be made before the pre-hearing meeting or within ten days thereafter. The Rules of Civil Procedure for the District Courts applicable to requests for admissions, govern except that the time for answers or objections is ten days and the Panel chairman or vice-chairman shall rule upon any objections, If a party fails to admit, the Panel may award expenses as permitted by the Rules of Civil Procedure for the District Courts.

(d) Deposition. Either party may take a deposition as provided by the Rules of Civil Procedure for the District Courts. A deposition under this Rule may be taken before the pre-hearing meeting or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by initials in any District Court proceeding.

(e) Pre-Hearing Meeting. The Director and the lawyer shall attend a pre-hearing meeting. At the meeting:

(1) The parties shall endeavor to formulate stipulations of fact and to narrow and simplify the issues in order to expedite the Panel hearing;

(2) Each party shall mark and provide the other party a copy of each affidavit or other exhibit to be introduced at the Panel hearing. The genuineness of each exhibit is admitted unless objection is served within ten days after the pre-hearing meeting. If a party objects, the Panel may award expenses of proof as permitted by the Rules of Procedure for the District Courts. No additional exhibit shall be received at the Panel hearing without the opposing party's consent or the Panel's permission; and

(3) The parties shall prepare a pre-hearing statement.

(f) Setting Panel Hearing. Promptly after the pre-hearing meeting, the Director shall schedule a hearing by the Panel on the charges and notify the lawyer of:

(1) The time and place of the hearing;

(2) The lawyer's right to be heard at the hearing; and

(3) The lawyer's obligation to appear at the time set unless the hearing is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman.

The Director shall also notify the complainant, if any, of the hearing's time and place. The Director shall send each Panel member a copy of the charges, of any stipulations, of the pre-hearing statement, and, unless the parties agree or the Panel chairman or vice-chairman orders to the contrary, of all documentary exhibits marked at the pre-hearing meeting.

(g) Form of Evidence at Panel Hearing. The Panel shall receive evidence only in the form of affidavits, depositions or other documents except for testimony by:

(1) The lawyer;

(2) A complainant who affirmatively desires to attend; and

(3) A witness whose testimony the Panel chairman or vice-chairman authorized for good cause.

If testimony is authorized, it shall be subject to cross-examination and the Rules of Evidence and a party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Rules of Civil Procedure for the District Courts. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege. The lawyer shall be denominated by initials in any district court proceeding.

(h) Procedure at Panel Hearing. Unless the Panel for cause otherwise permits, the Panel hearing shall proceed as follows:

(1) The Chairman shall explain that the hearing's purpose is to determine whether there is probable cause to believe that public discipline is warranted on any charge, and that the Panel will terminate the hearing whenever it is satisfied that there is or is not such probable cause (or, if the Director has issued an admonition under Rule 8(c)(2), that the hearing's purpose is to determine whether the Panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court);

(2) The Director shall briefly summarize the matters admitted by the parties, the matters remaining for resolution, and the proof which he proposes to offer thereon;

(3) The lawyer may respond to the Director's remarks;

(4) The parties shall introduce their evidence in conformity with the Rules of Evidence except that affidavits and depositions are admissible in lieu of testimony;

(5) The parties may present oral arguments; and

(6) The Panel shall either recess to deliberate or take the matter under advisement.

(i) Disposition. After the hearing, the Panel shall either:

(1) Determine that there is not probable cause to believe that public discipline is warranted (or, if the Director has issued an admonition under Rule 8(c)(2), affirm or reverse the admonition); or

(2) If it finds probable cause to believe that public discipline is warranted, instruct the Director to file in this Court a petition for disciplinary action. The Panel shall not make a recommendation as to the matter's ultimate disposition.

(j) Notification. The Director shall notify the lawyer, the complainant, if any, and the District Committee, if any, that has the complaint, of the Panel's disposition. If the Panel did not determine that there was probable cause to believe that public discipline is warranted, the notification to the complainant, if any, shall inform him of his right to petition for review under subdivision (k).

(k) Complainant's Petition for Review. If the complainant is not satisfied with the Panel's disposition, he may within 14 days file with the clerk of the Supreme Court a petition for review. The clerk shall notify the respondent and the Board Chairman of the petition. The respondent shall be denominated by initials in the proceeding. This Court will grant the review only if the petition shows that the Panel acted arbitrarily, capriciously, or unreasonably. If the Court grants review, it may order such proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may dismiss the

petition or, if it finds that the Panel acted arbitrarily, capriciously, or unreasonably, remand the matter to the same or a different Panel, direct the filing of a petition for disciplinary action, or take any other action as the interest of justice may require.

(l) Manner of Recording. Proceedings at a Panel hearing or deposition may be recorded by sound recording or audio-visual recording if the notification thereof so specifies. A party may nevertheless arrange for stenographic recording at his own expense.

(m) Panel Chairman Authority. Requests or disputes arising under this Rule before the Panel hearing commences may be determined by the Panel chairman or vice-chairman. For good cause shown, the Panel chairman or vice-chairman may shorten or enlarge time periods for discovery under this Rule.

(Amended July 22, 1982.)

Rule 13. Answer to Petition for Disciplinary Action

(a) Filing. Within 20 days after service of the petition, the respondent shall file an original and nine copies of an answer in this Court. The answer may deny or admit any accusations or state any defense, privilege, or matter in mitigation.

Rule 14. Hearing on Petition for Disciplinary Action

(a) Referee. This Court may appoint a referee with directions to hear and report the evidence submitted for or against the petition for disciplinary action.

(b) Conduct of hearing before referee. Unless this Court otherwise directs, the hearing shall be conducted in accordance with the rules of civil procedure applicable to district courts

and the referee shall have all the powers of a district court judge.

(c) Record. The referee shall appoint a court reporter to make a record of the proceedings as in civil cases.

(d) Referee's Findings, Conclusions, and Recommendations. The referee shall make findings of fact, conclusions, and recommendations, file them with this Court, and notify the respondent and Director of them. Unless the respondent or Director within five days orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive. One ordering a transcript shall make satisfactory arrangements with the reporter for his payment. The reporter shall complete the transcript within 30 days.

(e) Hearing before Court. This Court within ten days of the referee's findings, conclusions, and recommendations, shall set a time for hearing before this Court. The order shall specify times for briefs and oral arguments. The matter shall be heard upon the record, briefs, and arguments.